

In the Supreme Court of the United States

OCTOBER TERM, 1991

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL.,
PETITIONERS

v.

COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AND THE FEDERAL TRADE COMMISSION
AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the sham exception to the *Noerr-Pennington* doctrine can apply to a single unsuccessful lawsuit, when the lawsuit, although not baseless, was brought for the purpose of inflicting injury from the judicial process without regard to the outcome.

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INTEREST OF THE UNITED STATES
AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission enforce the federal antitrust laws. This case presents an issue concerning the scope of the sham exception to the *Noerr-Pennington* doctrine. Because conduct that comes within the *Noerr-Pennington* doctrine is not covered by the Sherman Act, the resolution of this issue directly affects the government's enforcement responsibilities. Moreover, the government has an interest in ensuring that rules under the antitrust laws are formulated to strike the proper balance between avoiding intrusions on protected and procompetitive activity and deterring and remedying anticompetitive conduct.

(1)

STATEMENT

1. Petitioners are the operators of a resort hotel in Palm Springs, California, called La Mancha Private Club and Villas. In 1981, La Mancha began renting movie videodiscs to guests, who could watch them on videodisc players and large-screen projection televisions provided in each room. In 1983, respondents, eight producers and distributors of theatrical motion pictures, brought a copyright infringement suit against petitioners alleging that La Mancha's rental of the videodiscs for viewing in the hotel rooms violated respondents' exclusive right "to perform the copyrighted work publicly." 17 U.S.C. 106(4). Pet. App. 4a-5a, 29a; J.A. 3-31, 218-219, 228-234, 239.

Petitioners denied liability under the copyright laws and filed a counterclaim alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and of state law. J.A. 32-49. In each of the three antitrust counterclaims, one of the anticompetitive acts alleged against respondents was "the filing of this suit, which is a sham and false and known by [respondents] to be so." J.A. 38, 39, 40-41.

The parties filed cross-motions for summary judgment on the copyright claims and, at the court's request, postponed discovery on the antitrust counterclaims while those motions were pending. In January 1986, the district court granted summary judgment for petitioners on the copyright claims. It held that the rooms of La Mancha were not public, and that the rental of videodiscs was therefore not an unauthorized public performance that infringed respondents' copyrights. Pet. App. 5a, 29a-30a, 40a-49a. The court entered its decision as a separate judgment, and respondents appealed. Petitioners then moved to compel discovery on the antitrust

counterclaims. The district court denied that motion and stayed discovery pending the outcome of respondents' appeal. *Id.* at 5a; J.A. 489-490. In 1989, the court of appeals affirmed the district court's ruling that petitioners had not infringed respondents' copyrights. Pet. App. 26a-37a.

2. Having prevailed on the copyright issue, petitioners renewed their requests for discovery on the antitrust counterclaims. J.A. 505-522. As a result of a discovery conference, respondents produced some documents to petitioners. Soon thereafter, however, respondents moved for summary judgment, arguing that their conduct in bringing the infringement lawsuit was outside the scope of the antitrust laws under the *Noerr-Pennington* doctrine.¹ Pet. App. 6a, 23a.

The district court granted summary judgment in favor of respondents. It held that the filing and prosecution of the copyright infringement action was not a sham, and that respondents' conduct was therefore protected against antitrust liability by *Noerr*. Pet. App. 23a-25a. The court explained that "[i]t was clear from the manner in which the case was presented that the plaintiff was seeking and expecting a favorable judgment." *Id.* at 24a. The court added that, although it had ruled against respondents, "the case was far from easy to resolve" and the court of appeals' opinion also suggested that the case was a difficult one. *Ibid.* The court therefore concluded that there was "probable cause for bringing the action." *Ibid.* In view of its holding that "the accused actions were adjudicated by the court and specifically determined not to have been a sham," the

¹ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

court rejected petitioners' assertion, J.A. 558, that further discovery was required.² Pet. App. 25a.

3. The court of appeals affirmed. The court first agreed with petitioners that the district court had failed to address several of petitioners' allegations of anticompetitive conduct other than bringing the copyright action, but it held that none of those claims warranted reversal of summary judgment.³ Pet. App. 8a. The court then turned to the issue of whether the copyright suit could form the basis of an antitrust claim consistent with the *Noerr-Pennington* doctrine. The court stated that if respondents' prosecution of the copyright infringement action violated the antitrust laws, the costs of defense would amount to antitrust injury. *Id.* at 10a. The court concluded, however, that regardless of respondents' subjective intent in bringing the action, the copyright suit was protected by *Noerr* because it was not baseless. *Id.* at 15a.

The court explained that, under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508,

² In a declaration submitted pursuant to Fed. R. Civ. P. 56(f), petitioners contended that discovery was needed as to "fact issues" bearing on respondents' intent, including "whether or not [respondents'] conduct is part of a pattern or practice of anticompetitive conduct and whether or not [respondents] knew those claims were baseless at the time they brought them." J.A. 570.

³ The court explained that one of the allegations—that respondents had engaged in a concerted refusal to deal—involved the rejection of petitioners' offer to settle the copyright case with a license. That claim, the court found, raised no issue separate from whether the maintenance of the copyright case could be challenged under the antitrust laws. Pet. App. 8a-9a. As to the remaining allegations, the court of appeals found that petitioners failed to demonstrate "that the alleged conduct caused antitrust injury." *Id.* at 9a.

510 (1972), a lawsuit is immune from Sherman Act liability by virtue of the *Noerr-Pennington* doctrine unless it is a sham. Pet. App. 11a. The court noted that *California Motor Transport* had identified, as sham activities, the use of "misrepresentations" in adjudications and the filing of a "pattern of baseless, repetitive claims." *Ibid.*, quoting 404 U.S. at 510. Here, the court observed, respondents' copyright action involved neither of those forms of sham activity. *Ibid.*

The court then rejected petitioners' argument that even though the copyright claim was not legally "baseless," it could still be attacked as a sham on the theory that respondents subjectively "did not honestly believe that the infringement claim was meritorious." Pet. App. 11a. The court concluded that its precedents required a showing that a lawsuit was baseless and had other anticompetitive features before it loses its *Noerr-Pennington* protection. *Id.* at 12a. The court stated that a broader application of the sham exception "may have a chilling effect on those who seek redress in the courts" through "a well-founded, but untested, legal theory," and that this would "erode the [F]irst [A]mendment right to petition that is the basis for the * * * doctrine." *Id.* at 14a-15a.

Applying that rule to the facts of this case, the court of appeals upheld summary judgment for respondents. The court noted that petitioners did not dispute the district court's conclusion that the copyright suit was not baseless, but was "brought with probable cause and presented issues that were difficult to resolve." Pet. App. 15a. The court therefore

held that the sham exception was inapplicable "as a matter of law." *Ibid.*⁴

SUMMARY OF ARGUMENT

A. The *Noerr-Pennington* doctrine immunizes from review under the antitrust laws activity undertaken in a genuine effort to obtain government action. But when the party that is ostensibly seeking government action is actually seeking to harm a competitor through invocation of the process itself, without regard to outcome, the activity may fall within the sham exception to the *Noerr-Pennington* doctrine.

The court of appeals held that a single unsuccessful lawsuit cannot be attacked as a sham if the suit was not baseless, regardless of other evidence indicating that the purpose of the lawsuit was to inflict harm solely through invoking the judicial process. That holding is incorrect. It conflicts with the focus in this Court's cases on the petitioning party's purpose to attain government action as the touchstone of the *Noerr* doctrine; it is unnecessary to avoid chilling protected First Amendment activity; and it would provide a formalistic loophole (albeit of limited dimension) in the protection afforded by the Sherman Act against anticompetitive conduct.

B. A properly focused application of the sham exception must balance the competing interests. While the court of appeals' requirement of baselessness is too narrow, a wholly subjective approach would deter the assertion of novel claims and would lead to

⁴ The court of appeals also held that the district court did not abuse its discretion in granting summary judgment without allowing further discovery, because the evidence sought, relating to respondents' subjective intent, "was relevant only if it was shown that the copyright infringement action was baseless." Pet. App. 18a.

protracted and burdensome antitrust litigation. Instead, the antitrust court should emphasize objective indicia of whether a lawsuit is a sham. When a lawsuit could not inflict competitive harm through the process alone, the sham claim should fail without more. Additionally, the existence of probable cause for suit constitutes strong evidence of a legitimate motive, and increases the burden on the plaintiff to show an improper purpose. Even if the lawsuit is partially motivated by such a purpose, the petitioning activity is still protected so long as the claimed desire to win is not pretextual. Finally, a showing of a sham lawsuit does not by itself establish an antitrust violation; if no antitrust claim is properly raised, the case can and should be dismissed on that basis.

C. The judgment in this case should be affirmed. Petitioners failed to make a showing that the copyright action was instituted to inflict harm from the judicial process alone, apart from its outcome. Moreover, petitioners' principal theory—that the suit was a sham because respondents knew it to be baseless—is untenable in light of the unchallenged finding below that the copyright suit was not baseless. Accordingly, although the court of appeals' analysis was in error, its affirmance of summary judgment was correct.

ARGUMENT

A. The Sham Exception To The *Noerr-Pennington* Doctrine Can Apply To A Single Unsuccessful Lawsuit Even When The Suit Is Not Baseless

1. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court rejected a claim by trucking companies that a publicity campaign orchestrated by railroads, intended to inflict competitive injury on the trucking industry by securing legislation, violated the Sherman Act. The Court held that no antitrust claim could be based on that conduct because the Sherman Act does not apply to "mere attempts to influence the passage or enforcement of laws." *Id.* at 135. The Court explained that the antitrust laws are not intended to regulate the political process by which citizens inform the government of their views, and that the Sherman Act should be construed to avoid impinging on constitutionally protected conduct. *Id.* at 137-138. The Court stated that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

The principle of *Noerr* applies even though the intent of the petitioning party may be to inflict injury on a competitor through government action, and even though the petitioning party knows, and even hopes, that the political and publicity process itself will incidentally inflict harm on a competitor. 365 U.S. at 143. Nevertheless, the Court recognized in *Noerr* that petitioning activity could be abused for anticompetitive purposes. The Court stated that "[t]here may be situations in which [the challenged conduct], ostensibly directed toward influencing government action, is a mere sham to cover what is ac-

tually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court applied the sham exception to find that certain petitioning activity fell outside of the *Noerr-Pennington* immunity. In that case, the plaintiffs alleged that the antitrust defendants had restrained trade by bringing state and federal proceedings to oppose the plaintiffs' applications to acquire, transfer, or register trucking operating rights. *Id.* at 509. The complaint charged that the antitrust defendants had "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases," with the purpose not of prevailing on the merits, but of depriving their competitors of access to the adjudicatory forum. *Id.* at 512. The Court held that the *Noerr* doctrine extends to the use of courts and administrative agencies, *id.* at 510-511,⁵ but that the allegations of the complaint were sufficient to come within the sham exception. *Id.* at 512-516.

The sham exception identified in *California Motor Transport* depends on the purpose of the party who invokes judicial or administrative machinery. As Justice Stewart explained in his separate concurrence in the judgment, the allegations before the Court in *California Motor Transport* justified further proceedings because if "the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately

⁵ "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510.

to prevent the respondents from invoking those processes," it would constitute the direct interference with a competitor's business dealings that may implicate the antitrust laws. 404 U.S. at 518 (emphasis in original). The majority agreed, stating that "a purpose or intent [to deprive competitors of meaningful access to the agencies and courts], if shown, would * * * fall within the exception to *Noerr*." *Id.* at 512.

This Court's most recent discussion of the sham exception to the *Noerr-Pennington* doctrine reaffirms the centrality of purpose to the concept of a sham. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), the Court confirmed that the test for determining whether otherwise-protected activity falls within the sham exception is whether the challenged activity is designed to injure competition through the process itself, rather than to procure government action:

The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. * * * A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all.

City of Columbia, 111 S. Ct. at 1354, quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988).

2. The court of appeals held that absent misrepresentations in the adjudicative forum, if a lawsuit is not baseless, it cannot be a sham.⁶ In the court's

⁶ The court of appeals interpreted *California Motor Transport* as permitting the finding of a sham only where misrepresentations occurred in the process of adjudication, or where the antitrust defendant pursues a "pattern of baseless, repeti-

view, when the lawsuit passes that objective test, no amount of evidence that the litigation was instituted solely to achieve anticompetitive harm through the process, rather than the ultimate result, could deprive the lawsuit of *Noerr-Pennington* protection. The court of appeals erred in introducing a threshold requirement of baselessness for invoking the sham exception.

This Court's decisions do not prescribe the rule espoused by the court of appeals, but have instead focused on the purpose and nature of the petitioning conduct. In *California Motor Transport*, the Court emphasized that if the "purpose or intent" of the party invoking the judicial process is to thwart a competitor's access to the courts, "the exception to *Noerr*" would apply. 404 U.S. at 512. While the examples given by the Court included "[m]isrepresentations" or "a pattern of baseless, repetitive claims," *id.* at 513, the Court's opinion did not limit the sham exception to those situations.⁷ In later cases, the Court explained that the sham exception applies to the use of the "governmental process" rather than the "outcome" of that process as a means of inflicting anti-

tive claims." Pet. App. 11a, quoting 404 U.S. at 513. In fact, the court of appeals truncated, and thereby distorted, the description of a sham suit used by this Court in *California Motor Transport*. See note 7, *infra*, and accompanying text.

⁷ The complaint sustained in *California Motor Transport* alleged that the proceedings were instituted "with or without probable cause, and regardless of the merits of the cases," 404 U.S. at 512. That suggests that the key in sham analysis is not baselessness, but indifference to outcome. In fact, the district court had found that 21 of the 40 proceedings brought by the antitrust defendants had produced action favorable to them. *Trucking Unlimited v. California Motor Transport Co.*, 1967 Trade Cas. (CCH) ¶ 72,298, at 84,744 (N.D. Cal. 1967).

competitive harm. *City of Columbia*, 111 S. Ct. at 1354; *Allied Tube & Conduit Corp.*, 486 U.S. at 500 n.4; *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110 & n.15 (1978). The inquiry into whether an attempt to use governmental processes is "genuine," *City of Columbia*, 111 S. Ct. at 1355, suggests that more is required, in the context of an unsuccessful lawsuit, than a mere finding that litigation, viewed abstractly, was not baseless.

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), is not to the contrary. That case considered whether the National Labor Relations Board could enjoin, as an unfair labor practice, the prosecution of a state-court lawsuit. The Court held that the Board could not do so unless the suit was brought with both a "[r]etaliatory motive and lack of reasonable basis." *Id.* at 748. In reaching that conclusion, the Court relied on "[c]onsiderations analogous" to those informing the sham exception to the *Noerr-Pennington* doctrine, *id.* at 744, including First Amendment values, *id.* at 741. The Court also stressed, however, that if the Board were given a broader power to enjoin such suits it would intrude on the "States' compelling interest in the maintenance of domestic peace" with respect to state claims that federal labor law does not preempt. *Ibid.*; see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897-898 (1984). *Bill Johnson's Restaurants* does not purport to delineate the boundaries of the antitrust sham exception,⁸ and the concern in that case to avoid friction between the Board and state courts through a litigation-freezing injunction is not present when a liti-

⁸ The Court described the approach it adopted in *Bill Johnson's Restaurants* as "similar," not identical, to the antitrust sham exception. 461 U.S. at 744.

gant's conduct is reviewed after-the-fact by the antitrust court.⁹

Nor do the First Amendment concerns that underpin the *Noerr-Pennington* doctrine require blanket immunity for non-baseless lawsuits. There is no constitutional protection for an unsuccessful lawsuit motivated by an impermissible purpose. See *Bill Johnson's Restaurants*, 461 U.S. at 749 (nonmeritorious suit brought with a retaliatory motive constitutes an unfair labor practice);¹⁰ *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982) ("If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, so far as we know, no one believes."), cert. denied, 461 U.S. 958 (1983).¹¹

⁹ The injunction setting of *Bill Johnson's Restaurants* sharply differentiates that case from the antitrust damages setting, which ordinarily poses no threat to ongoing proceedings. Cf. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (plurality opinion) (Anti-Injunction Act, 28 U.S.C. 2283, prohibits reliance on Section 16 of the Clayton Act, 15 U.S.C. 26, to enjoin state-court litigation on the theory that it is a sham). First Amendment concerns are at their height when government action imposes a prior restraint, as through an injunction. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

¹⁰ While the Board may not issue a cease-and-desist order "unless the suit lacks a reasonable basis," the Court stated that "it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose" and the Board can address that practice at the conclusion of the state case. *Bill Johnson's Restaurants*, 461 U.S. at 749.

¹¹ The common law tort of abuse of process applied to litigation instituted "for an end other than that which it was designed to accomplish" and turned on "[t]he purpose for which the process is used," not on whether the litigation was "begun

Litigation that does not genuinely aim at redress from the courts, but is designed only to cause harm from maintenance of the suit, should not be immunized from Sherman Act scrutiny for its own sake; it should be protected only if that were necessary to avoiding chilling legitimate lawsuits.

While it is important to avoid undue deterrence of the assertion of novel and uncertain claims, drawing the line at baselessness would open the door to anti-competitive abuse.¹² If the court of appeals' rule were adopted, it would provide a clear loophole in the Sherman Act's scheme of protection. Litigation can be a powerful weapon with which to inflict injury on business rivals, quite apart from success on the merits. Severe consequences may flow from the mere pendency

without probable cause." W. Keeton, *Prosser and Keeton on Torts* § 121, at 897 (5th ed. 1984); 3 *Restatement of Torts (Second)* § 682, at 474 (1977) (tort of abuse of process consists of "misuse of process * * * for any purpose other than that which it was designed to accomplish"; "it is immaterial that * * * proceedings * * * were brought with probable cause"). In *Wyatt v. Cole*, No. 91-126 (May 18, 1992), some Members of this Court expressed the view that the common law torts of abuse of process and malicious prosecution required a showing of both an unlawful purpose and an absence of probable cause. See slip op. 4 (Kennedy, J., concurring); slip op. 3 (Rehnquist, C.J., dissenting). That suggestion does not universally reflect the common law, however.

¹² This case does not present the issue of whether a single, successful lawsuit can be labeled as a sham. In theory, such a suit could be brought to inflict harm on a competitor through the process alone, regardless of outcome. It is likely, however, that a successful plaintiff would be motivated, at least in part, to prevail. However the balance should be struck when the antitrust defendant prevails in the alleged sham suit, the relevant considerations do not dictate immunity for all unsuccessful, albeit non-baseless, lawsuits.

of court action, and the ability of the judicial process itself to hamstring competitors may spur the filing of a lawsuit without regard to the likelihood of winning. Such abuses can be a source of antitrust concern, even when the litigation rests (however tenuously) on probable cause.

For example, in *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 62 (D. Minn. 1971), vacated in relevant part, 410 U.S. 366 (1973), a monopolist in the provision of electric power had begun or supported lawsuits that effectively frustrated the sale of revenue bonds that would have financed competing municipal power systems. As the district court noted, a "no-litigation certificate" was "essential" to market the bonds, such that the "pendency of litigation" alone prevented the construction of competing power stations. 331 F. Supp. at 62; see 410 U.S. at 372.¹³ If the court of appeals' rule were adopted, firms that wished to interfere with a competitor's financing efforts could file a strategically timed lawsuit with no interest in prevailing, secure in the knowledge that if the lawsuit were not entirely baseless, it would be immune from all antitrust review. The result would

¹³ The district court explained that "although all of [the litigation] was unsuccessful on the merits, the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership." 331 F. Supp. at 62 (footnote omitted). This Court stated that the record supported that finding, but it vacated the judgment on that point for further consideration in light of *California Motor Transport*, which applied the *Noerr-Pennington* doctrine to judicial proceedings. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372, 379-380 (1973). On remand, the district court found that the litigation was a sham—without making any finding of baselessness—and this Court summarily affirmed. 360 F. Supp. 451 (E.D. Minn. 1973), aff'd, 417 U.S. 901 (1974).

be a safe harbor for parties who could devise a plausible legal and factual foundation for a suit, even though the litigation was intended solely to inflict injury by its mere institution.¹⁴

That is not to deny that, even when a claim ultimately fails on the merits, the First Amendment right to petition deserves substantial protection against the burden of a possible antitrust counterattack. Nor is it to question that lack of baselessness can be powerful evidence that the judicial action is not a sham. Nevertheless, the court of appeals' test goes materially beyond what is necessary or appropriate to protect the values underlying the right to petition, and it does so at the expense of the fundamental policy of competition reflected in the antitrust laws.

B. A Proper Formulation Of The Sham Exception Emphasizes Objective As Well As Subjective Factors That Bear On The Purpose Of The Lawsuit

The ultimate inquiry in a sham case is whether the litigation was brought to inflict harm through the process alone, without regard to the outcome. In our view, the appropriate sham analysis should consider both objective and subjective factors, in order to protect the First Amendment interest in ensuring free-

¹⁴ The Fifth Circuit has rejected that approach precisely because it refused to "endorse a rule that would require a court to blindly extend protection in the face of evidence that the party was in fact not exercising the protected right to petition." *In re Burlington Northern, Inc.*, 822 F.2d 518, 529 n.8 (1987), cert. denied, 484 U.S. 1007 (1988). In that case, a pipeline company alleged that a group of railroads was not interested in judicial relief because the railroads' "goal of defeating the pipeline depended primarily on delaying the project to the point it became so expensive to be infeasible as a competitive enterprise." 822 F.2d at 528.

dom for litigants to seek redress from the courts while furthering the purpose of the Sherman Act to preserve competition. Such an inquiry, appropriately managed, can minimize difficulties and burdensomeness in examining the antitrust defendant's intent.

1. An unguided inquiry into subjective intent under the sham exception can give rise to several practical concerns. To begin with, genuine efforts to obtain favorable legal rulings may well be deterred by the fear that the assertion of a novel claim may be branded, in retrospect, as a device designed to exploit the burdens of the litigation process. The potential for chilling protected conduct is magnified by the prospect of antitrust treble damages. Moreover, even a successful defense against antitrust claims based on a theory of sham litigation can be costly, burdensome, and intrusive. Discovery into subjective intent is often time-consuming and may touch on areas protected by the attorney-client privilege and the work-product doctrine.

The court of appeals' rule responds to those concerns, but its bright-line test is neither required nor appropriate to meet them.¹⁵ As in other contexts in

¹⁵ It is also questionable how "bright" a line the court drew. The court of appeals did not explain whether it equated a "baseless" action for sham purposes to one that would merit sanctions under Fed. R. Civ. P. 11, or, if not, whether it had a different analogy in mind. Regardless of the standard chosen, the inquiry into baselessness is malleable enough to reflect a judge's perception of whether a particular litigant was "really" engaged in a sham—an inquiry that boils down to subjective intent. For example, in this case the district court inferred from "the manner in which the case was presented that the plaintiff was seeking and expecting a favorable judgment." Pet. App. 24a. If the courts are to consider what a party was truly "seeking," however, it is better to

which subjective intent is at issue in a business setting, the courts can rely largely on documentary evidence of a party's reasons. Cf. *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2758 (1991). "The difficulty of determining the true purpose [of a lawsuit] is great but no more so than in many other areas of antitrust law." *Grip-Pak, Inc.*, 694 F.2d at 472.¹⁶ And, as we discuss below, reliance on objective factors in making the sham determination will minimize the risk of an erroneous decision, thereby reducing the concern for chilling protected conduct.¹⁷

Nor do the pressures and burdens of discovery into intent present insuperable problems in this context, although discovery must be carefully managed by district courts. Discovery can be of especial concern

acknowledge the relevance of the inquiry into intent, and to permit reasonable presentation of evidence on it.

¹⁶ But see P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 203.1c, at 24 (Supp. 1991) ("the inquiry into subjective intent is hazardous and of doubtful utility in most cases"; subjective intent "is often a jumble of mixed impulses, even if we succeed in identifying the particular human being(s) whose intention is relevant").

¹⁷ It is a familiar principle that rules that operate on the boundaries of First Amendment activity must be framed to avoid "chilling" protected expression. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). The concern of chill carries less force, however, as applied to the typical commercial lawsuit that is likely to form the basis of a sham charge under the antitrust laws. Cf. *Allied Tube & Conduit Corp.*, 486 U.S. at 505-507 (finding *Noerr* inapplicable to attempts to influence an industry standard-setting body because of the commercial context). Even where claims to protect intellectual property are concerned, the Court has not foreclosed all inquiry into a party's intent in order to avoid a chilling effect. *Walker Process Equipment, Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 (1965).

in areas touching on First Amendment activity. There is no reason, however, to impose an absolute ban on discovery in this setting, where the policies of the antitrust laws would be compromised if litigants had carte blanche to commence non-baseless lawsuits for the purpose of producing injury through the process alone. Cf. *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (no First Amendment privilege against inquiry into faculty peer review materials relevant to a discrimination claim).

Discovery can be expensive, time-consuming, and distracting. And, especially where, as here, sensitive First Amendment rights are also implicated, district courts should "exercise appropriate control over the discovery process" to block excessive or burdensome discovery into subjective intent and to "prevent abuse." *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, *speedy*, and *inexpensive* determination of every action." (Emphasis added.) To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense" Rule 26(c).

Ibid. Similarly, in antitrust cases alleging the sham exception, "judges should not hesitate to exercise appropriate control over the discovery process." *Ibid.*; see *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 546 (1987) ("Judicial supervision of discovery should

always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests.”); *P. Areeda & H. Hovenkamp*, *supra*, ¶ 203.4d, at 57 (noting that summary judgment in a sham-exception case may appropriately be granted without discovery if the “necessary facts” bearing on a dispositive issue “are readily available to the plaintiff”). In particular, a sham claim, more than most antitrust cases, may lead plaintiffs to seek discovery of confidential or privileged communications involving attorneys. The mere claim of a sham, however, does not overcome those protections. *Burlington Northern*, 822 F.2d at 533-534. Courts are well versed in procedures to simplify the resolution of contested claims of privilege. See *United States v. Zolin*, 491 U.S. 554 (1989) (describing use of in camera procedures, when a proper threshold showing is made, to resolve crime-fraud claims).

2. While inquiry into purpose is appropriate, courts should put particular weight on objective evidence in determining whether the plaintiff has met his burden to establish the sham exception, for many sham claims can be resolved without extended direct inquiry into a party’s subjective intent. First, the sham exception, at a minimum, cannot apply when the plaintiff is unable to plead (and properly support at the summary judgment stage) a reasonable theory of how the institution of the lawsuit, apart from its outcome, could harm competition. If litigation cannot suppress competition from the defendant unless it is successful, the sham exception has no application. Seeking government action, even to achieve anticompetitive results from that action, is precisely what the *Noerr-Pennington* doctrine protects. *United Mine Workers v. Pennington*, 381 U.S. 657, 669-670 (1965). The claim that a lawsuit is a sham can often be dis-

posed of simply by considering that issue.¹⁸ Cf. *Eastman Kodak Co. v. Image Technical Services, Inc.*, No. 90-1029 (June 8, 1992), slip op. 15 (“If the plaintiff’s theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.”). When that is the case, discovery into intent would be unnecessary and inappropriate.

Second, when a losing suit is not baseless, but reasonably grounded in law and fact, that is significant evidence that it was brought for the ordinary reason suits are brought—to secure a favorable judgment—rather than to inflict the legal process on an opponent. Accordingly, “when a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment.” *Westmac, Inc. v. Smith*, 797 F.2d 313, 318 (6th Cir. 1986), cert. denied, 479 U.S. 1035 (1987). As the suit rises above the level of probable cause, the burden on the antitrust plaintiff to demonstrate applicability of the sham exception is heightened. The stronger the showing of objective plausibility of the suit, the more reason there is to doubt that it was

¹⁸ See *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1084 (9th Cir. 1976) (“Mere opposition [by the antitrust defendants] would not defeat [the antitrust plaintiff’s] purpose; to do that, defendants had to persuade the Board to rule in their favor.”); *Boulware v. Nevada*, 1992-1 Trade Cas. (CCH) ¶ 69,771, at 67,540 (9th Cir. 1992) (“On the facts of this case, [the antitrust defendant] had little or nothing to gain from losing. Few benefits could have been derived from an unsuccessful suit, and there is no reason to believe that NCSC participated in the case regardless of the outcome or without a legitimate expectation of success on the merits.”).

brought with an improper purpose, and the corresponding greater showing of a prohibited purpose through other evidence is required.¹⁹

It is also appropriate to test the plaintiff's evidence of subjective intent stringently. Ordinarily, some objective circumstantial evidence would be necessary to establish an intent to inflict process-related harm, for there will rarely be an explicit admission that a lawsuit was brought without regard to the merits.²⁰ For example, Judge Posner has suggested that it is evidence of a sham if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation" but for some process-related benefit. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d at 472. While the "stakes" in litigation may not always be clear—particularly when a judgment may be sought for its precedential value—the expected net benefits from a suit can be an important indication of its purpose. See *Westmac, Inc. v. Smith*, 797 F.2d at 318-319 (granting summary judgment when the suit had probable cause, the evidence indicated substantial benefits to be derived from success, and there was no substantial evidence to support a contrary inference).

¹⁹ Under such a sliding scale, it may well be that a prevailing litigant in a single lawsuit should never be exposed to antitrust liability under the sham exception. See note 12, *supra*. Conversely, "a complete lack of reasonableness necessarily must deprive a person of protection." *Burlington Northern*, 822 F.2d at 529.

²⁰ In other types of sham-exception suits, misrepresentations in litigation or a pattern of losing suits may provide evidentiary support for the inference that the process is being invoked without a legitimate desire to win. In the absence of those factors, proving improper purpose is more difficult, but not impossible.

Even if a plaintiff shows some element of improper motive, however, that is not sufficient to establish that a suit is a sham. *Noerr*, 365 U.S. at 142-144. It is to be expected that firms seeking a judgment against their rivals "would be aware of, and possibly even pleased by, the prospect of such injury" that incidentally flows from the process of litigation. *Id.* at 143. "To hold that the knowing infliction of such injury renders the [lawsuit] itself illegal would thus be tantamount to outlawing all such [litigation]." *Id.* at 143-144. Therefore, unless the plaintiff can establish that the jury could reasonably find that the putative sham suit lacked sufficient legitimate motive to be genuine, the claim of a sham should not go to a jury.²¹ It is not enough for a plaintiff simply to ask the jury to disbelieve the antitrust defendant's statement that its purpose was to prevail. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

The approach we propose, of course, would not permit resolution of all sham claims on summary

²¹ Courts have used different formulations to express the burden on the plaintiff to establish improper motive. For example, in *Burlington Northern*, 822 F.2d at 528, the court of appeals said that the controlling issue is whether the challenged suit was "significantly motivated by a genuine desire for judicial relief." See *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983). Other courts have indicated that sham litigation is "litigation filed by an individual solely to harass and not to win a favorable judgment." *Westmac, Inc. v. Smith*, 797 F.2d at 316, citing *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 263 (7th Cir. 1984). This Court need not define in this case the precise degree to which the antitrust defendant must be motivated to win in order for its litigation activity to be immunized under the *Noerr-Pennington* doctrine; it is clear enough that only when the antitrust plaintiff shows a plainly pretextual use of the courts will the normal immunity be stripped away.

judgment. To that extent, it would result in more discovery and trials than would the court of appeals' standard. In our view, however, the availability of a properly qualified, but still meaningful level of antitrust scrutiny is required by the policies of the Sherman Act. Litigation guided by a properly focused sham inquiry will vindicate those policies of protecting competition, without either (1) generating excessive complications for resolving antitrust counterclaims, or (2) chilling the legitimate assertion of untested claims.²²

3. Finally, the costs of applying the sham exception to suits that are not baseless are substantially reduced by the normal antitrust screens. A sham suit does not necessarily violate the antitrust laws. The antitrust plaintiff must also meet the usual requirements to allege a violation of the Sherman Act, and those requirements will not often be satisfied in cases resting on a claim of a single sham suit. A sham suit may cause injury to a particular competitor, but that alone does not implicate the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws protect competition, not competitors). Courts should not hesitate to dispose of antitrust cases quickly when, even if a sham could be proved, the sham suit would raise no antitrust concerns. See *Razorback Ready*

²² Indeed, it would increase, not decrease, the amount of counterproductive litigation if plaintiffs were given free rein under the Sherman Act to institute non-baseless—but highly doubtful—cases for abusive purposes. Although the antitrust laws are not the sole or even the primary source of protection from such abuses, they can serve an important purpose in preventing and redressing the economic harm from suits brought to suppress competition through the process of litigation.

Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985) (finding, in the alternative, that even if suit challenging a bond issue were a sham, the antitrust plaintiff failed to state a claim under the Sherman Act); Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 122-123 (1985) (discussing use of antitrust screen to reduce the number of cases requiring adjudication of sham claim).

C. Summary Judgment Was Correctly Granted In This Case Because Petitioners Failed To Support A Theory Under Which The Sham Exception Would Be Applicable

In light of the approach we propose, the judgment should be affirmed. Although the rationale on which the courts below relied is incorrect, petitioners failed to present evidence from which a reasonable jury could have determined that respondents' suit was a sham. *Eastman Kodak Co.*, slip op. 15 & n.14; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595-598 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).

As an initial matter, petitioners failed to make a showing that respondents inflicted antitrust injury through the process, as opposed to the outcome, of the copyright litigation. The court of appeals noted that petitioners "neither pleaded nor presented evidence" that the videodisc rental service had been interrupted; that the hotel lost guests; or that they were prevented from marketing the video viewing system to others. Pet. App. 9a. The only "antitrust injury" for which the court saw any basis was the cost of defending the copyright suit. *Id.* at 10a. Yet there was no showing that the costs of defense were so substantial that they impeded competition by

petitioners. Thus, on the evidence petitioners adduced, "the mere filing of a lawsuit was insufficient to achieve" respondents' alleged anticompetitive goal; rather, "[i]n order to succeed, [respondents] needed the actual relief [they were] requesting from the courts." *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 535 (9th Cir. 1991).

Moreover, petitioners' theory that the unsuccessful copyright suit was a sham rested entirely on the claim that respondents knowingly filed a baseless lawsuit. See J.A. 38, 39, 40-41, 555, 574. But respondents could not have *known* the copyright action was baseless. The district court found the case "far from easy to resolve" and concluded that "there was probable cause for bringing the action." Pet. App. 24a. Petitioners did not challenge that determination on appeal, *id.* at 11a; and do not challenge it in this Court. Since respondents' suit was not baseless in law or fact, respondents could not have "known" it to be baseless.²³

Nor would the allegedly broader pattern of anti-competitive conduct on respondents' part establish that the copyright suit was a sham. Pet. App. 7a-8a; Pet. Br. 29-30. If respondents engaged in other anti-competitive activity, it would indicate that they hoped to suppress competition from petitioners, but it would not suggest that they instituted the copyright case without desiring relief. At best, the evidence would

²³ Petitioners' opposition to summary judgment also suggested that the copyright action was a sham because respondents believed it to be without merit, even if it was not actually baseless. J.A. 554. But the evidence on that point was the same as the evidence presented to show actual baselessness. If that evidence does not show actual baselessness, it cannot support the inference that respondents believed that the suit was baseless.

tend to suggest a mixed motive for the lawsuit, but such a mixture is not sufficient to deny *Noerr-Pennington* protection.²⁴

Although petitioners did not obtain the discovery they requested in this case, see Pet. Br. 30, further discovery and a postponement of summary judgment is not warranted in light of the showing made by petitioners. Faced with respondents' motion, petitioners cited Fed. R. Civ. P. 56(f) in contending that before the court ruled, discovery should be allowed into "fact issues" bearing on respondents' intent, "includ[ing] whether or not [respondents'] conduct is part of a pattern or practice of anticompetitive conduct and whether or not [respondents] knew those claims were baseless at the time they brought them." J.A. 570. That explanation, however, fails to meet the requirements ordinarily applied to Rule 56(f) affidavits. It neither "articulate[s] some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet come in from the cold," nor shows "some realistic prospect that the facts * * * will, if obtained, suffice to engender an issue both genuine and material." *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale*

²⁴ Petitioners now suggest that respondents' refusal to settle the copyright litigation by granting a license, and their insistence "upon litigating their copyright claim to the bitter end," Pet. Br. 8, 30, supports an inference of a sham. Petitioners, however, did not argue to the district court or the court of appeals that the failure to settle was a reason to conclude that the copyright action was a sham. J.A. 553-562; Pet. C.A. Br. 22. In any event, a copyright holder's refusal to grant a license suggests that judicial relief—and a legal precedent—was genuinely desired, not that the case was a sham.

Elec. Co., 840 F.2d 985, 988 (1st Cir. 1988).²⁵ As we have explained, petitioners' generalized claims that the suit was known to be baseless and was embedded in a matrix of anticompetitive conduct are insufficient. In light of petitioners' failure to make a more particularized showing of what else they hoped to discover, the granting of summary judgment was proper and there is no warrant for remanding this case for further proceedings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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²⁵ See also *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 422 (2d Cir. 1989) (affidavit must explain what facts are sought and how they are reasonably expected to create a genuine issue of material fact).